Filed 3/22/13 In re M.S. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.S., JR., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. M.S., JR., Defendant and Appellant.	F065293 (Super. Ct. No. JL003206) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. David W. Moranda, Judge.

Kendall Simsarian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Cornell, J., and Poochigian, J.

On November 5, 2009, the Merced County District Attorney filed a juvenile wardship petition (Welf. & Inst. Code, § 602)[1] alleging that appellant, M.S., Jr., a minor, committed three counts of felony vandalism (Pen. Code, § 594, subd. (a)(1)) and one count of resisting, delaying or obstructing a peace officer (Pen. Code, § 148, subd. (a)(1)), a misdemeanor. On December 9, 2009, appellant admitted the allegations of the petition. On January 6, 2010, the court granted appellant deferred entry of judgment (DEJ) (§ 790 et seq.) and set a "deferred entry of judgment review" hearing for January 5, 2011.

By memorandum dated December 27, 2010, the Merced County Probation Department (Probation Department) informed the juvenile court that appellant had been arrested on vandalism charges and had thereby "picked up an Adult Case," and recommended that appellant's DEJ be extended "until there is a finding in the Adult Court case." On January 5, 2011, the court, noting in its written order "ADULT MATTER PENDING," ordered DEJ extended to April 6, 2011, and set a review hearing for that date. Thereafter, the court extended appellant's DEJ four more times.

In a memorandum dated June 7, 2012, submitted to the juvenile court, the Probation Department stated the following: Appellant's adult criminal case was not yet resolved—it was set for trial—but appellant had paid the previously ordered restitution in full, had completed the previously ordered 96 hours of community service, and "appears to have done well on [DEJ] in that he is attending college and working full time." It was "recommended [*sic*] that [appellant] has successfully completed [DEJ]."

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1 Except as otherwise indicated, all statutory references are to the Welfare and Institutions Code.

In court on June 8, 2012, the juvenile court ordered DEJ "lift[ed]" and adjudged appellant a ward of the court. The court then immediately terminated appellant's wardship.

On appeal, appellant contends the court erred in lifting DEJ and adjudging him a ward of the court. He bases this contention, in turn, on claims that the statute that provides for lifting of DEJ is unconstitutionally vague, the procedure set forth in the DEJ statutory scheme for lifting DEJ violates due process principles, the evidence was insufficient to support the lifting of DEJ, and that in lifting DEJ the court failed to comply with various provisions of the California Rules of Court.[2] The People concede that the court failed to comply with lifting-of-DEJ procedures set forth in the rules of court, and that therefore this court should vacate the judgment and remand the matter to the juvenile court with an instruction to dismiss the November 2009 wardship petition. Appellant, in a letter submitted in lieu of a reply brief, agrees with the People's proposed disposition of the appeal. We accept the People's concession. Accordingly, we reverse and direct the juvenile court to dismiss the instant wardship petition.

DISCUSSION

Legal Background

The DEJ provisions have been explained as follows: "The DEJ provisions of sections 790 et seq. were enacted as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998, in March 2000. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit the allegations contained in a section 602 petition and waive time for the pronouncement of judgment. Entry of judgment is deferred. After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation

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[2] All rule references are to the California Rules of Court.

department, the court is required to dismiss the charges. The arrest upon which judgment was deferred is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (§§ 791, subd. (a)(3); 793, subd. (c).)" (*Martha C. v. Superior Court* (2003) 108 Cal.App.4th 556, 558.)

Section 793, subdivision (a) (section 793(a)) sets forth the consequences of a minor's failure to comply with the conditions of the DEJ: "If it appears to the prosecuting attorney, the court, or the probation department that the minor is not performing satisfactorily in the assigned program or is not complying with the terms of the minor's probation, or that the minor is not benefiting from education, treatment, or rehabilitation, the court shall lift the deferred entry of judgment and schedule a dispositional hearing." (§ 793(a).)

In addition, the court must terminate DEJ and set the matter for a disposition hearing if the minor "is convicted of, or declared to be a person described in Section 602 for the commission of" one felony or two separate misdemeanors during the DEJ period. (§ 793(a).)

Rule 5.800(h) provides for "a hearing … to determine if the deferred entry of judgment should be lifted …." (Rule 5.800(h)(2)(A).) At such hearing, "the court must follow the procedure stated in rule 5.580(d) and (e) …." (*Ibid*.) Accordingly, at such hearing the parties must be allowed to present "relevant and material evidence …." (Rule 5.580(e).) In addition, a disposition hearing must be "conducted thereafter." (Rule 5.800(h)(2)(A).) "The disposition hearing must be conducted as stated in rules 5.785 through 5.795." (Rule 5.800(h)(2)(B).) The applicable rules require, inter alia, that the minor be allowed to present relevant evidence. (Rule 5.785(b).)

Factual and Procedural Background

Near the outset of the June 8, 2012, hearing, the court noted that appellant's criminal case was not resolved and stated it would once again extend DEJ. At that point

the deputy district attorney (DDA) pointed out that appellant would turn 21 years of age "in a couple of weeks."[3] The court observed that at that point the juvenile court would lose jurisdiction, and invited comment from the DDA, who responded as follows: Appellant had two pending adult criminal cases. "There is at least probable cause to believe he committed these offenses …." The DDA had "scanned through" the police report on one of those cases and had concluded that "there is sufficient evidence for him to be convicted at trial …."

The court stated that by virtue of the fact the criminal matters were set for trial, "there has been a determination of probable cause"; "[w]e don't have to have beyond a reasonable doubt to lift somebody's DEJ"; and "the question is should I lift his DEJ because of the probability that he committed these new crimes[?]" After hearing further argument, the court stated: "Well, there has been a finding of probable cause. My feeling is that the DEJ should be lifted and that he should become a ward of the court, immediately terminate the wardship." If appellant was eventually acquitted in adult court, the court explained, "then at that point I would go ahead and reverse my ruling and terminate his DEJ and go ahead and take back the finding of wardship." Shortly thereafter, the court ruled that there had been a "finding of probable cause on the two vandalism charges that are currently pending in adult court that occurred during his period of DEJ, [and] for that reason I am lifting his DEJ and I'm making him a ward of the Court." The court then immediately terminated appellant's wardship.

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3 The record shows that appellant turned 21 years of age on June 18, 2012.

Analysis

For several reasons, all of which the People acknowledge, the judgment must be reversed. First, as indicated above, DEJ may be terminated only if a minor suffers convictions and/or adjudications as set forth in section 793(a) or if the court finds the "minor is not performing satisfactorily in the assigned program or is not complying with the terms of the minor's probation, or that the minor is not benefiting from education, treatment, or rehabilitation …." (§ 793(a).) Here, as also indicated above, appellant had suffered no adult convictions or juvenile adjudications during his DEJ period and the court did not make any of the required findings regarding appellant's performance on DEJ probation. Rather, as the People state, "it appears that the court's decision to lift DEJ was based on the unresolved charges rather than a finding that appellant had failed to comply with the conditions of his DEJ."

Second, as the People also state, in violation of rules of court regarding the conduct of the hearing (rules 5.800(h)(2)(B), 5.785(b)), "Appellant was not given the opportunity to dispute the unresolved adult charges or present evidence establishing his compliance with the terms and conditions of his DEJ."

Finally, and again as the People state, the court adjudged appellant a ward of the court during the DEJ review hearing, and thus, in violation of rule 5.800(h)(2)(A) "did not schedule a separate disposition hearing and it did not give the parties an opportunity to present evidence on the matter."

Based on the forgoing, the judgment must be reversed. Moreover, because appellant turned 21 years of age on June 18, 2012, the juvenile court no longer has jurisdiction except to enter an order dismissing the petition. (See § 607; *In re Arthur N.* (1976) 16 Cal.3d 226, 241, disapproved on other grounds in *In re Eddie M.* (2003) 31

Cal.4th 480, 507-508.) We will remand the matter for that purpose. Return of appellant to the juvenile court for further proceedings is unnecessary. (*In re Arthur N.*, at p. 241.)[4]

DISPOSITION

The judgment is reversed. The matter is remanded to the juvenile court. On remand, the court is directed to dismiss the instant wardship petition filed November 5, 2009.

[4] Because we decide appellant's plea on the grounds set forth above, we need not address his constitutional and sufficiency-of-the-evidence arguments.